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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, AND LOCAL UNION 2602, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioners,

v.

DONALD C. FLOWERS AND KING E. JONES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

I. THE § 10(b) ISSUE

1. The major premise of respondents' argument for applying state limitations statutes to fair representation claims is that, "[t]he omission of a statute of limitations from § 301 reflects a Congressional *intention* that State limitations period should apply" to such claims (Resp. Br. at 20) (emphasis added). Thus, respondents find it largely unnecessary to discuss our analysis as to why application of the § 10(b) limitations period would best effectuate congressional policies because, in their view, Congress consciously opted for local limitations periods in enacting the Labor Management Relations Act ("LMRA"). As we proceed to show, respondents' position suffers from two independent flaws.

First, the fair representation duty and cause of action were not created by § 301 but have an existence independent of that provision. Section 301 is, of course, in terms a grant of jurisdiction to the federal courts to adjudicate "[s]uits for violation of contracts between an employer and a labor organization . . . or between . . . labor organizations." From this jurisdictional grant, the Court in *Textile Workers v. Lincoln Mills*, 353 U.S 448 (1957), implied a federal duty on the part of employers and unions to adhere to their contracts.

But the federal duty of fair representation was *not* derived from § 301; rather, that duty was found to be "implicit in the *National Labor Relations Act* because that statute"—specifically § 9—"affords unions exclusive power to represent all employees of a bargaining unit." *Electrical Workers v. Foust*, 442 U.S. 42, 46-47 n.8 (1979) (emphasis added).[1] And the judicial cause of ac-

[1] The Court in *Foust* elaborated on the point as follows:

> [W]hen Congress empowered unions to bargain exclusively for all employees in a particular bargaining unit, and thereby

tion for breach of the duty likewise was "judicially 'implied from the statute and the policy which it had adopted,'" *id.* at 47, in order to effectuate the fair representation duty. Thus, the source of the fair representation duty and cause of action is the NLRA (*i.e.*, the Wagner Act as amended by Title I of the LMRA) and not § 301. And the fair representation cause of action exists independently of § 301.[2] Because the fair representation cause of action was not created by the enactment of § 301, Congress' omission of a limitations period in § 301 does not support an inference that Congress intended by that omission to apply state limitations laws to fair representation claims.

Second, even if *arguendo* the fair representation cause of action were a creature of § 301, the absence of a § 301 limitations period still would not be determinative here.

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subordinated individual interests to the interests of the unit as a whole, it imposed on unions a correlative duty "inseparable from the power of representation" to exercise that authority fairly. [442 U.S. at 46]

See also e.g., Hines v. Anchor Motor Freight Inc., 424 U.S. 554, 564 (1976); *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 64 (1975); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953); *cf. Steele v. L. & N.R. Co.*, 323 U.S. 192 (1944).

[2] That the fair representation cause of action is not dependent for its existence upon § 301 is confirmed by two additional considerations. First, it is clear that jurisdiction over fair representation claims exists apart from § 301. In *Tunstall v. Brotherhood*, 323 U.S. 210 (1944), a Railway Labor Act case, the Court predicated jurisdiction over a fair representation claim upon the predecessor of 28 U.S.C. § 1337. And in *Syres v. Oil Workers*, 350 U.S. 892 (1955), and *Ford Motor Co. v. Huffman, supra*, 345 U.S. at 332 n.4, cases under the NLRA, the Court found jurisdiction over fair representation claims based on *Tunstall* without mention of § 301.

Second, jurisdiction over some fair representation claims—those challenging the union's performance in negotiating or failing to negotiate a contract—cannot be predicated upon § 301 because such suits are not "for violation of contracts." *See* Pet. Br. at 13 n.5.

In all events it is clear that when § 301 was enacted the fair representation cause of action "had not yet [been] divined," *United Parcel Service v. Mitchell*, 451 U.S. 56, 76 (1981) (Stevens, J., dissenting). Respondents offer no evidence whatsoever to suggest that Congress in enacting § 301 contemplated that fair representation claims would be brought under the section. Consequently, in enacting § 301 Congress could not have formulated any intent as to the limitations period for fair representation claims. Thus, whatever the omission of a § 301 limitations period may signify for *other* types of § 301 actions, that omission signifies nothing about congressional intent with respect to fair representation claims. Respondents' major premise thus fails. *See also* Pet. Br. at 12-14.[3]

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[3] Respondents (Br. at 17-18) and respondent Anchor Motor in *Del Costello* (Br. at 16-17) contend that the Rules of Decision Act, 28 U.S.C. § 1652, bears on the choice of a limitations period for fair representation causes of action—exactly how, they do not say. Respondents do not appear to challenge our submission that the question of what limitations period applies to the fair representation cause of action turns on the proper construction of the statutes that give rise to that cause of action. (*See* Pet. Br. at 10-12). In any event, this Court has framed limitations questions for other federal causes of action (including certain § 301 actions, *see* Pet. Br. at 12 n.4) as questions of statutory construction, and, on that basis, the Court several times has decided not to apply a state statute of limitations to a federally-created right for which no express time limit was provided in the statute creating the right. *See Holmberg v. Ambrecht*, 327 U.S. 392 (1946); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958); *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1971). *See also Johnson v. Railway Express Agency*, 421 U.S. 454, 465 (1972) ("Although state law is our primary guide in this area it is not, to be sure, our exclusive guide"); *Chevron Oil Co. v. Huston*, 404 U.S. 97, 104 (1971).

The Court has proceeded in that fashion because the Rules of Decision Act requires resort to state laws only "in cases where they [state laws] apply," *viz.*, only in cases in which a state-created right is asserted. This follows from the Court's long-standing understanding of the Act as being "no more than a declaration of what the law would have been without it," *Hawkins*

2. We therefore return to the point of our opening brief: although Congress did not anticipate that the

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v. Barney's Lessee, 30 U.S. 457, 464 (1831); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 72 n.2 (1938), for absent the Rules of Decision Act there would be no requirement for a federal court to apply state law to the enforcement of federally-created rights. Furthermore, in *Erie* the Court concluded that "the purpose of the [Rules of Decision Act] was merely to make certain that in all matters except those in which some federal law is controlling, the federal courts *exercising their jurisdiction in diversity cases* would apply as their rules of decision the law of the State." 304 U.S. 72-73 (emphasis added). And post-*Erie*, this Court has not relied on the Rules of Decision Act in deciding *any* question involving the enforcement of a federally-created right. Indeed, in *Guaranty Trust Co. v. New York*, 326 U.S. 99 (1945), the Court, in holding that the Rules of Decision Act required application of a state statute of limitations in a *diversity* case, was careful to begin its analysis by "put[ting] to one side the considerations relevant in disposing of questions that arise when a federal court is adjudicated a claim based on federal law." *Id.* at 101. *See also Holmberg v. Ambrecht*, *supra*, 327 U.S. at 394, 395 (distinguishing *Guaranty Trust* in federal question case); *Angel v. Bullington*, 330 U.S. 183, 192 (1947); *Burks v. Lasker*, 441 U.S. 471, 476-77 (1979).

Of particular relevance here is the fact that in fair representation cases the Court has not found itself bound by state laws in answering questions on which Congress had not expressly spoken but has, instead, sought "to implement a remedial scheme that will best effectuate the purposes of the [National Labor Relations or Railway Labor] Act." *Electrical Workers v. Foust*, *supra*, 442 U.S. at 47; *see also id.* at 53 (Blackmun, J., concurring); *Bowen v. Postal Service*, —— U.S. ——, 51 U.S.L.W. 4051 (Jan. 11, 1983).

It has been suggested that the Rule of Decisions Act actually applies to *all* cases and that the Court's decision not to follow state law in various federal question cases was because the Act does not require the Courts to do so where "the . . . Acts of Congress otherwise require or provide." *See Robertson v. Wegman*, 436 U.S. 584, 597-98 (1978) (Blackmun, J., dissenting); Westen & Lehman, *Is There Life For Erie After the Death of Diversity*, 78 Mich. L. Rev. 311 (1980). We do not understand the Court to have adopted that view; certainly, the language and reasoning of the post-*Erie* decisions point the other way. In any event, even under this theory determining what limitations period applies here would turn on construing the federal statute that creates the right sued upon.

courts would imply a cause of action for breach of the duty of fair representation, Congress did decide in enacting § 10(b) that legal proceedings that threaten the smooth functioning of the consensual processes established by the NLRA must be instituted within six months. *See* Pet. Br. at 17-21. Respondents, while implicitly conceding this point, contend that it has no application to this fair representation suit. In their view, a fair representation claim challenging the union's performance in arbitration does not pose such a threat because "the consensual process of arbitration already has taken place" (Resp. Br. at 30). Respondents' argument cannot withstand analysis.

The grievance-arbitration process established by a collective bargaining agreement provides a means by which the parties to the agreement (with the aid of a neutral arbitrator) peacefully resolve their disputes and, in so doing, establish "the law of the shop," *United Parcel Service v. Mitchell*, *supra*, 451 U.S at 64. The fair representation cause of action, notwithstanding its important role in the collective bargaining system established by the NLRA, represents a challenge to a decision arrived at through the collective bargaining process—a decision that the parties to the process are prepared to live by. During the period in which fair representation claims may be filed challenging the union's performance in processing the arbitration case (or in resolving a grievance prior to arbitration), the parties cannot rely on the arbitrator's decision (or their own resolution) as final. Thus, fair representation claims, although not aimed at blocking the arbitration hearing (or grievance procedure) from taking place, nevertheless threaten the "smooth functioning" of the grievance-arbitration machinery as a system of dispute resolution. *See also* Pet. Br. at 15-17, 25-27. Indeed, it was for this very reason that the Court in *Mitchell* found the NLRA policy favoring the " 'relatively rapid disposition of labor disputes' " applicable, 451 U.S. at 63 (citing § 10(b)). The Court explained:

> This [grievance-arbitration] system . . . with its heavy emphasis on grievance, arbitration and the 'law of the shop' could easily become unworkable if a decision which has given 'meaning and content' to the terms of an agreement . . . could suddenly be called into question as much as six years later. [*Id.* at 64]

Our argument in this regard is strongly corroborated by the brief *amicus curiae* of the Chamber of Commerce of the United States in this case. Although the Chamber represents only employers and not unions, the Chamber has elected to file an *amicus curiae* brief here concerning the limitations period for fair representation claims against unions because, in the Chamber's words (Br. at 2), that issue is of "vital concern to the large number of Chamber members who are parties to collective bargaining agreements containing grievance and arbitration procedures." As the Chamber explains, a fair representation claim, if successful, "undercut[s] the precedential value of arbitration awards," and thus the potentiality that such a claim could be filed years after the arbitrator's award was rendered necessarily implicates "[t]he efficacy of a private-dispute resolution system." *Id.*; *see also id.* at 10-11; Brief for Respondent Anchor Motor Freight in *Del Costello* at 21-22.[4]

It follows, as Justice Stewart concluded in his separate opinion in *Mitchell*, that the balance Congress struck in § 10(b) is "precisely the balance at issue" in the fair representation context, 451 U.S. at 70, and Congress' aims are best effectuated by application of § 10(b) to fair representation claims.[5]

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[4] *See also* Br. for Respondent Teamsters Local 557 in *Del Costello* at 9-10. Ironically, the Chamber, Anchor Motor, and Local 557, after demonstrating that fair representation claims strongly implicate the congressional policy protecting the consensual processes of dispute resolution, all nonetheless seek to avoid application of § 10(b), the statute of limitations Congress fashioned to effectuate that policy, and urge instead adoption of shorter limitations periods borrowed from state law.

[5] Since the filing of our opening brief, the Court below in a hybrid § 301/breach of duty action against a union and an em-

Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), which respondents claim requires application of a state limitations period here, actually confirms our conclusion.[6] That was a suit alleging a breach of a collective agreement that did not contain any machinery for resolving such disputes; the Court held that the timeli-

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ployer recognized that § 10(b) "reflects a judgment by Congress in a closely analogous context—*i.e.*, unfair labor practice actions commenced under the NLRA—that six months represents a proper accommodation between the employee's right to be heard and the important national interest in industrial peace"; that application of § 10(b) "ensures that all labor disputes will be resolved expeditiously, thereby strengthening the 'stability of bargaining relationships' "; and that application of § 10(b) furthers "the strong 'national interest in uniformity in industrial relations,' particularly where the labor disputes implicates 'those consensual processes that federal labor law is chiefly designed to promote.' " *Assad v. Mount Sinai Hospital*, No. 82-7251 (2d Cir., March 9, 1983), slip op. at 11-12. Based on this reasoning, the court of appeals in *Assad* applied § 10(b) to the claim against the employer. But because the *Assad* panel concluded that the decision below in the instant case "represents the law of the Circuit and we must follow it," *id.* at 4, the panel applied the three-year malpractice statute of limitations to the claim against the union. Two of the three members of the *Assad* panel stated that but for the decision below in this case they "would be inclined to apply the section 10(b) limitations period against both the union and the employer on the basis that the reasons for adopting that period are more persuasive in fair representation actions," *id* at vi n.3; Judge Oakes, who also was a member of the two-judge panel that decided the instant case, disagreed.

[6] Respondents' reliance on *United Parcel Service v. Mitchell*, *supra*, to support application of state law is likewise misplaced. In *Mitchell*, the Court *assumed* without deciding that state law was appropriately borrowed because all the parties had so assumed both in this Court and below; the Court expressly reserved the question whether the § 10(b) limitations period should have been applied had it been raised. *See* 451 U.S. at 60 n.2; *see also id.* at 64 (*"Given the choices present here* . . . we think the District Court was correct when it chose the 90-day period imposed by New York for the bringing of an action to vacate an arbitration award") (emphasis added).

ness of the claim was to be determined by reference to a state limitations law.[7] But in reaching this conclusion the Court first noted that the limitations question was "clearly a federal question, for in § 301 suits the applicable law is 'federal law, which the courts must fashion from the policy of our national labor laws.'" *Id.* at 701. And, in concluding that for the case before it Congress had intended that that federal question be answered by looking to state law, the Court reasoned that although "the subject matter of § 301 is 'peculiarly one that calls for uniform law[,]' [o]ur cases have defined the need for uniformity . . . in terms that are largely inapplicable here." *Id.* The Court explained:

> The need for uniformity . . . is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it. For the most part, statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy. [*Id.* at 702]

The Court added this caution:

> The present suit is essentially an action for damages caused by an alleged breach of an employer's obligation embodied in a collective bargaining agreement.

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[7] The plaintiff-union in *Hoosier Cardinal* had urged adoption of a uniform limitations period for a "suit for damages caused by breach of a collective agreement" and suggested that a six-year period was appropriate as six years was "the median period on contract actions in the states" and was "the standard which Congress has approved for contract suits in the Court of Claims" (Br. for Pet. at 18). Contrary to respondents' repeated assertions in their brief in this case (at 5, 19, 29), the union in *Hoosier Cardinal* did *not* rely on the § 10(b) limitations period.

> Such an action closely resembles an action for breach of contract cognizable at common law. *Whether other § 301 suits different from the present one might call for the application of other rules on timeliness, we are not required to decide,* and we indicate no view whatsoever on that question. [*Id.* at 705 n.7; emphasis added]

Hoosier Cardinal thus does not hold, as respondents seem to believe, that Congress intended local limitations to apply to *all* suits brought under § 301 (*see* Resp. Br. at 18-19, 30-31). Rather, all that the decision holds is that Congress intended application of state limitations periods with respect to those § 301 claims that "closely resemble[] an action for breach of contract cognizable at common law" and thus do not "threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote." And by drawing this distinction, *Hoosier Cardinal* suggests that with respect to fair representation claims—which, as we have shown, *do* implicate the smooth functioning of the consensual processes—Congress' policies would best be effectuated by applying a uniform limitations period. The congressional desire for uniformity provides yet additional proof that § 10(b) is the proper source for determining the limitations period for the fair representation cause of action.

3. Respondents cite a number of other statutory provisions—none of which they suggest is the source of the duty of fair representation—in an attempt to buttress their argument that application of state law to the judicial cause of action for breach of the duty of fair representation best accords with Congress' intent (Resp. Br. at 20-28). As we show in the margin, these other provisions shed no light on the issue presented here.[8]

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[8] Respondents rely on the following provisions:

(a) *LMRA §§ 302 and 303*—Respondents argue that in enacting the LMRA, Congress "drew a clear line of legislative demarcation between amendments to the National Labor Relations Act . . . and

II. THE STATE LAW ISSUE

1. If the Court were to conclude that *state* statutes of limitation apply to fair representation claims, the Court would then have to decide which state limitations period

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§ 301 and its contiguous provisions, §§ 302 and 303 . . . plac[ing] them in separate titles" (Resp. Br. at 20). Respondents assert that Congress intended local limitations to apply to §§ 302 and 303, and view that decision as somehow revelant to understanding Congress' intent with respect to fair representation actions.

The premise of respondents' argument—that state limitations periods apply under §§ 302 and 303—is by no means obvious; there are strong arguments for concluding that a uniform limitations period was intended for the uniquely labor-law causes of action created by §§ 302 and 303. This Court has never decided the question with respect to either section. (In *Mine Workers v. Railing*, 401 U.S. 486 (1971), on which respondents rely with respect to § 303, the Court summarily vacated an appellate court decision as to when a § 303 cause of action accrues and remanded that decision to the court of appeals for reconsideration in light of *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), an antitrust case; the Court did not consider in *Railing* any question as to the limitations period for a § 303 claim as no such question was raised by any party.) But it is not necessary to decide the § 302 and § 303 limitations questions in this case because even if Congress did intend state limitations periods to apply under those sections, that intention would not be relevant here for two reasons.

First, to the extent that Congress drew the "clear line" respondents suggest, the fair representation cause of action falls on the NLRA side of the line and not the Title III side; the fair representation duty was created by the NLRA and the judicial cause of action was implied to enforce that NLRA duty. *See* pp. 1-2, *supra*.

Second, in any event, the "line" on which respondents rely is of no analytical significance to this case. Congress' treatment of §§ 302 and 303 (and of the other provisions of Title III of the LMRA, §§ 304 and 305, which have since been repealed) says nothing about Congress' intent with respect to the limitations period for fair representation claims. Those sections involve causes of action *unrelated* to the fair representation cause of action or to each other; they were grouped together in a single title of miscellaneous provisions with no common thread. The fact that they are "contiguous" to § 301 hardly indicates either that Congress thought of the limitations issue for fair representations actions in enacting § 301 or

should be borrowed. In their brief respondents concede as they must in light of this Court's decisions that "an element of proof in a breach of the duty of fair representa-

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that Congress would have applied state law had it thought of the issue.

Respondents argue (Br. at 21) that the treatment of § 303 is "especially instructive . . . because it in terms provides for a suit against the union on a claim which can be established only by reference to an unfair labor practice." But unlike fair representation suits, the cause of action for "damages . . . sustained" by a secondary boycott—which is the only cause of action authorized by § 303—does not threaten the smooth functioning of the NLRA's consensual process; to the contrary, such suits can be brought only when the consensual processes "have already broken down," *Hoosier Cardinal, supra*, 383 U.S. at 702. Thus, the absence of an express limitations period for § 303 actions is not probative of Congress' intent with respect to the limitations period for fair representation actions. Indeed, it is far more significant that Congress subjected the filing of unfair labor practices charges under § 8(b)(4), seeking injunctions against secondary boycotts, to the § 10(b) limitations period. Unlike damages, injunctions intrude on the economic weapons contributing to the reaching of an agreement and thus—like fair representation actions—§ 8(b)(4) injunction proceedings implicate the functioning of the consensual processes.

(b) *Labor-Management Reporting and Disclosure Act ("LMRDA")*—Respondents' reliance on Title I of the LMRDA is doubly flawed. First, the Court's task here is to construe the Wagner Act and the LMRA; the LMRDA was enacted by a different Congress years later and thus is not authoritative. *See Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977).

Second, Title I of the LMRDA regulates "the conduct of internal union affairs," *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 193 (1967); the duty of fair representation, in contrast, regulates a union's conduct in representing bargaining unit members vis-a-vis the employer. To be sure, both types of regulation grew out of the fact that "the national labor policy vested unions with power to order the relations of employees with their employer," *id.* at 181, but the two types of claims implicate very different interests. In particular, as shown above (pp. 5-6 *supra*), fair representation claims implicate that aspect of the national labor policy that seeks to secure industrial peace through the functioning of consensual processes for resolving disputes between unions and employers; Title I claims,

tion case is . . . that the employer breached the contract" (Resp. Br. at 12-13). Respondents also concede that the thrust of their claim is that there was a "breaking down or malfunctioning of the process of . . . arbitration" (Resp. Br. at 30). Yet respondents nonetheless contend that the arbitration statute is not appropriately borrowed because "[t]he conduct to be tried in this case against the union is breach of the duty of fair representation at the arbitration hearing," and the propriety of the Union's conduct "was not before the arbitrator" (Resp. Br. at 15; *see also* Resp. Br. at 14). Respondents' argument is trebly flawed.

First, respondents' argument is contrary to the reasoning of *United Parcel Service v. Mitchell, supra.* That case

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because they involve only internal union matters, do not directly implicate this interest. This Court so recognized in *Clayton v. Automobile Workers*, 451 U.S. 679, 688 (1981), when it concluded that "an alleged breach of the union's duty of fair representation . . . raises issues rooted in statutory policies extending far beyond internal union interests," and that therefore considerations that were relevant to LMRDA litigation—specifically "the policy of forestalling judicial interference with internal union affairs," *id.* at 687—were not applicable to fair representation litigation. *See also Electrical Workers v. Foust, supra*, 442 U.S. at 47 n.9 (reserving question of award of punitive damages under LMRDA).

(c) *Postal Reorganization Act* ("PRA")—Like the LMRDA, the PRA was enacted years after the LMRA and for that reason alone is of little relevance here. In any event, the PRA makes the NLRA applicable to labor relations in the Postal Service, 39 U.S.C. § 1209(a); thus, it is the *NLRA* duty of fair representation, and the *NLRA* cause of action for breach of that duty that applies to postal service unions, and not a special duty or special cause of action created by the PRA. Moreover, although the PRA contains, in § 1208(b), its own version of § 301, the fair inference from the omission of a limitations period in that section is not that Congress elected to apply state law to actions under § 1208(b) but that Congress intended whatever limitations period applies under § 301 to apply to the analogous claims under § 1208(b). To rely on the PRA as evidence of congressional intent here, therefore, is sheer bootstrapping.

involved a § 301 claim against an employer. The "indispensable predicate" for that claim was "a demonstration that the union breached its duty of fair representation." 451 U.S. at 62. That predicate issue had not been an issue "before the arbitrator." But the Court did not view this fact as rendering the arbitration statute of limitations inapplicable; to the contrary, it was precisely *because* plaintiff was required to prove a breach of duty by the union that the *Mitchell* Court concluded that the arbitration statute was applicable. In the Court's words:

> Since the conclusion of the Joint Panel was, under the collective-bargaining agreement, 'binding on all parties,' respondent was required in some way to show that the Union's duty to represent him fairly at the arbitration had been breached before he was entitled to reach the merits of his contract claim. *This*, in our view, makes the suit more analogous to an action to vacate an arbitration award than to a straight contract action. [451 U.S. at 62; emphasis added. *See also* Pet. Br. at 27-29.]

Second, the New York statute of limitations for actions to vacate arbitration awards applies in terms to suits in which the "conduct to be tried"—for example, "partiality," "corruption," "fraud," or other acts of "misconduct in procuring the award"—was not an issue "before the arbitrator."[9] The arbitration statute of limitation applies to such suits not because the issues are the same as those decided by the arbitrator, but because if the plaintiff prevails on such issues the *effect* would be to invalidate the arbitrator's decision. And as this Court has held, the same is true of proof of a breach of the duty of fair representation: such proof "undermines the integrity of

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[9] N.Y. Civil Practice Law & Rules § 7511(b)(1)(i), (ii). Federal courts vacate arbitration awards on these same grounds in § 301 actions by unions or employers seeking that relief. *See* R. Gorman, *Labor Law Text* 599-600 (1976).

the arbitral process" and thereby "removes the bar of the finality provisions of the contract." *Hines v. Anchor Motor Freight, Inc., supra,* 424 U.S. at 567. *See also* Pet. Br. at 26-27.

Third, in any event, respondents ignore their own concession that, under this Court's decisions (cited in Pet. Br. at 26), a necessary element in their fair representation claim is proof of the employer's breach of contract. Thus, the "conduct to be tried" in the fair representation case is not merely the union's conduct but also the employer's. And the employer's conduct *was* the subject of the arbitration proceeding and the arbitrator's decision. *See also* Pet. Br. at 25-26.

For all these reasons, respondents' attempt to defeat application of the arbitration statute on the ground that the "conduct to be tried" in this case was not an issue "before the arbitrator" must fail.[10]

2. Respondents devote much of their brief to constructing an analogy between fair representation actions and malpractice actions (Resp. Br. at 6-14). But Respondents' argument, even if it were valid (and we show in a moment it is not), would establish only that there are two possible analogies here, one (the malpractice analogy) based upon the supposed similarities between the duties of an attorney and a union and the other (the arbitration analogy) based upon the effect that a judgment for plaintiff would have on the arbitral process. In *Mitchell* the Court also was presented with two

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[10] Respondents also argue against the arbitration statute on the ground that the remedy available in a fair representation suit may differ from the remedy available in arbitration (Resp. Br. at 14). Respondents' argument misses the critical point: regardless of the particular relief the employee obtains, the *effect* of a judgment in his favor in a fair representation suit is necessarily to undermine the validity of the arbitrator's decision. This makes the arbitration statute applicable.

analogies, one to traditional contract actions and the other to actions to vacate arbitration awards. The *Mitchell* court concluded in light of "the federal policies involved," 451 U.S. at 61—specifically the policy favoring the " 'relatively rapid disposition of labor disputes,' " *id.*, and disfavoring "the results of the . . . arbitral process being suspended in limbo for long periods," *id.* at 64—that, "as a matter of federal law," the arbitration statute of limitations provided the more "appropriate" limitations period for the claim against the employer, *id.* at 60. Similarly, here, even assuming *arguendo* the validity of respondents' malpractice analogy, the same federal policies would counsel adoption of the arbitration statute of limitations as the more appropriate analogy.

But, in any event, even on its own terms respondents' analogy cannot withstand analysis, for respondents make the mistake of attempting to apply "traditional common law principles," *Bowen v. Postal Service*, *supra*, —— U.S. at ——, 51 U.S.L.W. at 4053, to the relationship between an exclusive bargaining representative and those it represents even though that relationship is "a creature of 'labor law,' " *Mitchell*, *supra*, 451 U.S. at 63, and is embedded in a system of regulation of the rights and duties of employers, unions and employees. When the relevant labor-law principles are taken into account, the attempted malpractice analogy crumbles.

To begin with, unlike the duty imposed on an attorney, the duty of fair representation does *not* rest on the theory that union officers are "professional[s]" who possess "the special knowledge and capacities which an attorney brings to legal issues" (Resp. Br. at 10-11). Union stewards and grievance representatives for the most part are rank-and-file workers who have been elected by their fellows to their posts; as the courts of appeals have recognized, "[i]t would not be realistic to try to hold them to the

same standards as lawyers." [11] Indeed the duty of fair representation is not a personal duty imposed on union representatives individually [12] but is imposed on the union as an entity as a corollary of the provisions of the "[n]ational labor policy . . . [which] extinguish[] the individual employee's power to order his own relations with his employer and create[] a power vested in the chosen representative to act in the interests of all employees," *NLRB v. Allis-Chalmers*, *supra*, 388 U.S. at 180-81. *See also* p. 1 & n.1, *supra*.

As representative of all employees in a collective bargaining unit, the union is placed in a very different posi-

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[11] *Graf. v. Elgin, Joliet & Eastern Ry. Co.*, 697 F.2d 771, 779 (7th Cir. 1983); *see also Freeman v. O'Neal Steel Inc.*, 609 F.2d 1123, 1127 (5th Cir. 1980), *cert. denied*, 449 U.S. 833; *Curtus v. United Transportation Union*, 112 L.R.R.M. 2864, 2865 (8th Cir. 1983); *Findley v. Jones Motor Freight*, 639 F.2d 953, 958 (3rd Cir. 1981). In part for this reason, the courts of appeals are unanimous in holding that the tort-law duty of "due care"—the duty an attorney owes to his clients—"has not been made a part of the union's duty." *De Arroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 284 (1st Cir. 1970), *cert. denied*, 400 U.S. 877. Cases so holding from seven circuits are collected in *Harris v. Schwerman Trucking Co.*, 668 F.2d 1204, 1206-07 (11th Cir. 1982).

[12] *See, e.g., Williams v. Pacific Maritime Ass'n*, 421 F.2d 1287, 1289 (9th Cir. 1970); *Ramsey v. Signal Delivery Service Inc.*, 631 F.2d 1210, 1212 (5th Cir. 1980); *Spielman v. Anchor Motor Freight Inc.*, 551 F. Supp. 817, 820 n.2 (S.D.N.Y. 1982); *Balestreri v. Western Carloading*, 530 F. Supp. 825, 831 (N.D. Cal. 1980); *Suwanchi v. Electrical Workers*, 528 F. Supp. 851, 861-62 (D.N.H. 1981); *Hetrick v. Aluminum Workers Union*, 478 F. Supp. 17 (E.D. Pa. 1979); *Pedro v. Teamsters Local 490*, 509 F. Supp. 83 (N.D. Cal. 1981); *Ransdell v. Machinists*, 443 F. Supp. 936, 940 (E.D. Wis. 1978); *Mims v. Capitol Printing Ink Co.*, 428 F. Supp. 12, 14 (D.D.C. 1976); *Henry v. Radio Station KSAN*, 374 F. Supp. 260, 267 (N.D. Cal. 1974); *Hall v. Pacific Maritime Ass'n*, 281 F. Supp. 54, 61 (N.D. Cal. 1968); *Larry v. Penn Truck Aids Inc.*, 94 F.R.D. 708, 710 (E.D. Pa. 1982). *See generally Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962).

tion from an attorney representing a client, and owes a very different duty. Unions represent bargaining units in which "[c]onflict between employees represented . . . is a recurring fact," *Humphrey v. Moore*, 375 U.S. 335, 349-50 (1964), and the union "must be free" to take a "good faith position contrary to that of some individuals whom it represents," *id.* at 349. Thus, a union, unlike an attorney, does not owe a duty of undivided loyalty to each worker it represents; rather, the union's duty is simply to refrain from actions that are "arbitrary, discriminatory or in bad faith," *Vaca v. Sipes*, *supra*, 386 U.S. at 190. The fair representation doctrine "carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301 (1971).

The differences between the attorney-client and union-employee relationships are highlighted by contrasting the role of attorneys in litigation with the role of unions in arbitration proceedings. In a lawsuit, of course, the client is the party and the attorney his advocate; the attorney's duty is, within the confines of the canons of ethics, to advocate precisely what his client asks. In arbitration, in contrast, the union is itself the party and the employee/grievant has no formal role in the process. And the union, as always, represents the bargaining unit as a whole and not just the individual grievant: "In arbitration, as in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974); *see also Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 742 (1981).[13]

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[13] Respondents' efforts (Br. at 11) to analogize the role of the union to the role of an attorney representing a class in a class action is misplaced. A prerequisite to a class action is adequate representation. *Hansberry v. Lee*, 311 U.S. 32 (1940). "The adequate rep-

Thus, the union stands in a very different position *vis-a-vis* the represented employees than does an attorney *vis-a-vis* his clients, and the duty a union owes to members of the bargaining unit is quite different from the duty an attorney owes to a client. For these reasons alone, the malpractice analogy respondents propound is strained. But there is an even more fundamental flaw in that analogy which makes it especially inappropriate to transport it into the labor relations context: the malpractice statute of limitations does not take into account the interests of *other* parties that are uniquely implicated by fair representation claims.

A malpractice action is, as respondents correctly note, a private dispute between the attorney and his former client (Resp. Br. at 13); a determination that the attorney failed properly to assert the client's right as against some third party will not affect the rights of the third party for those rights have been finally determined. Consequently, the limitations period for such a suit implicates only the competing interests of the attorney and the client. The fair representation duty, in contrast, is an integral part of a system for regulating relationships between employees, unions and employers, and a fair representation suit has ramifications that extend beyond the immediate parties to the suit because such a suit, if successful, would undermine the validity of an arbitrator's decision establishing the "law of the shop" (pp. 5-6 *supra*). Thus, the limitations period for fair representation actions implicates interests of the employer, his other employees and the public at large, because that limitation period will determine the period of time during which the law of the shop will be unsettled. Accord-

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resentation requirement is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class." *General Telephone Co. v. EEOC*, 446 U.S. 318, 331 (1980); *see also East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 405 (1977).

ingly, the malpractice analogy, which does not take into account these interests, is not an appropriate one—and at the least is less appropriate than the arbitration analogy—in choosing a state limitations period.[14]

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[14] In *Del Costello* the parties in their briefs have addressed at length a variety of retroactivity issues with respect to this Court's *Mitchell* decision. Whatever the resolution of those issues, they cannot affect the outcome of *this* case for two reasons.

First, as all parties agree, this case (and *Del Costello*) present to the Court for the first time the question of the limitations period applicable to the claim against the *union* in a hybrid § 301/breach-of-duty suit. It is well-established that even a rule that is to be given wholly prospective application nonetheless is applied to the case in which the rule is announced; this is done to avoid the Article III problems that otherwise would be presented. *See, e.g., Stovall v. Denno*, 388 U.S. 293, 301 (1967); *Desist v. United States*, 394 U.S. 244, 254-55 n.24 (1969).

Second, even if there were no Article III impediment to withholding application of the rule to be announced in this case to the claims in this case, there would be no justification for that course. At the time that respondents' cause of action arose and at the time that suit was filed, the rule in the Western District of New York (in which all events at issue here took place and in which the suit was filed) was that the applicable statute of limitations was New York's 90-day limitations period for actions to vacate arbitration awards. *Barbarino v. Anchor Motor Freight, Inc.*, 421 F. Supp. 1003 (W.D.N.Y. 1976). Thus, respondents could not properly have "relied" on an expectation that a longer limitations period would be applicable in waiting eleven months before filing this action. That no doubt explains why respondents have never asserted a right to nonretroactivity, and why the court below, without any objection from respondents, applied *Mitchell* retroactively to respondents' claim against the Company.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court below should be reversed.

Respectfully submitted,

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